Supreme Court, U.S.
FILED
AUG 25 2003
OFFICE OF THE CLERK

(3)

No. 02-1807

IN THE

Supreme Court of the United States

DORIS DAY ANIMAL LEAGUE, *et al.*,
Petitioners,

v.

ANN VENEMAN, Secretary
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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I. USDA FAILED TO DEMONSTRATE THAT THE COURT OF APPEALS' OPINION IS CONSISTENT WITH SUPREME COURT PRECEDENT

As demonstrated in petitioners' earlier brief, the court of appeals' opinion creates a new judicial review standard that is in direct conflict with Supreme Court precedent. USDA's brief in opposition to certiorari fails to refute this argument and, in turn, is unable to cite to Supreme Court precedent to support the court of appeals' method of reviewing this case.

A. The Court Of Appeals' Decision Conflicts With Supreme Court Precedent For Determining The Plain Meaning Of Statutory Terms

The court of appeals' decision reviewed whether USDA's definition of "retail pet store" is "possible" rather than thoroughly reviewing the plain meaning of the AWA. *Doris Day Animal League v. Veneman*, 315 F.3d 297, 298 (D.C. Cir. 2003), Pet. App. at 25a. USDA was unable to defend this novel method of reviewing statutory terms because the court of appeals' opinion directly conflicts with longstanding Supreme Court precedent for reviewing the plain meaning of statutory terms. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). If the court of appeals had thoroughly reviewed the plain meaning of the AWA language, then the court would have had no choice but to find that Congress intentionally chose the wording of the statute to differentiate between "retail pet stores" and individuals who sell pets retail from their own homes.[1] Rather than reviewing

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[1] In a misguided attempt to justify the agency's overly broad definition of "retail pet store," USDA sets forth a confused reading of the AWA's licensing provision of dealers. USDA states that the "agency's regulation does not equate a retail pet store with any "person." Res't Br. at 6. This is a clear misreading of the law. Under the AWA, a "person" includes "any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." 7 U.S.C. § 2132(a) (2000). Although USDA tries to argue that a "retail pet store" is not a person, the

the language of the AWA to determine the plain meaning of "retail pet store," 7 U.S.C. § 2132(f) (2000), the court of appeals ignored the standard of review this Court established in *Chevron* and deferred to USDA's interpretation.

B. The Court Of Appeals' Decision Creates A New Standard For Determining Whether An Agency Acted Reasonably In Construing Statutory Terms

The court of appeals' decision is based solely on a review of the "reasonableness" of USDA's policy justifications for exempting thousands of puppies from the protections of the AWA. Contrary to Supreme Court precedent, the court failed to examine the fair and ordinary meaning of the term "retail pet store." *See AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 389-90 (1999).[2] No one equates a "retail pet store" with a home.

AWA broadly defines person to include legal entities that are stores (companies, corporations, etc.) and individuals. Moreover, in the licensing provision, Congress differentiates between a retail pet store and individuals who sell animals, by using the language "retail pet store or *other person*" who breeds dogs or cats on his own premises. *Id.* § 2133 (2000) (emphasis added). Congress clearly intended individuals who sell dogs from their home to fall within the meaning of "other person" not within the meaning of "retail pet store." For an in-depth discussion of this argument, *see* Pet. For Writ Of Cert. at 13-15.

[2] The court of appeals' reliance upon USDA's resource allocation argument also conflicts with Supreme Court precedent. There is no excuse for illegally excluding a whole class of pet dealers from regulation based upon an agency's resource priorities. Nowhere in the AWA does Congress give USDA unlimited discretion to exclude all retailers because it would rather use the money on another program. Instead, "the Supreme made clear in Iowa Utilities Board, the FCC cannot reasonably blind itself to statutory terms in the name of efficiency. *Chevron* deference does not bow to such unbridled agency action." *GTE Serv. Corp. v. Fed. Communications Comm' n*, 205 F.3d 416, 423-24 (D.C. Cir. 2000) citing *Iowa Util. Bd.*, 525 U.S. at 389.

The court of appeals even apparently recognizes the distinction between a store and a private home. In describing a "retail pet store," the court of appeals distinguishes between the selling of dogs from a residence and a store. *Veneman*, 315 F.3d at 298. The court cites as a hypothetical retail pet store, a building separate from the home where dogs are advertised for sale. Inside the building, there is a cash register, leashes, collars, and other dog paraphernalia. *Id.* From this example, the court of appeals understands that a store is a commercial establishment that is separate from a home and accessible to the public. The court of appeals also states that the local zoning authority would likely recognize this building as a store. *Id.* By contrast, a residential retailer that raises dogs in a basement is not a commercial establishment accessible to the public and would likely not be recognized by the zoning authority as a store. In addition, the court notes that the regulation of individuals selling pets from their private homes could lead to "potential invasions of privacy" as a result of federal inspections. *Id.* at 301. Clearly, a "retail pet store" would not have the same expectation of privacy as a private home.

Not only does the court of appeals appear to recognize the difference between a home and a "retail pet store," but also USDA admits that its regulatory definition of "retail pet store" is not the common and ordinary meaning of the term. Pet. App. at 114a (explaining that their regulatory interpretation of "retail pet store" includes "a very large number of facilities that are not traditional pet stores."). Clearly, both USDA and the court of appeals appear to recognize the ordinary and common meaning of the term "retail pet store" and the only justification given for permitting the broad regulatory definition of this term is based upon policy considerations. This new standard for assessing the reasonableness of agency interpretations is contrary to Supreme Court precedent because it grants agencies extraordinary power and unlimited discretion. This standard

should not be allowed to stand as new precedent for assessing the reasonableness of an agency's regulatory definition.

USDA also points to the court of appeals' reliance upon the agency's longstanding interpretation of the AWA to demonstrate that their definition of "retail pet store" is reasonable. Contrary to USDA's brief, the fact that Congress has amended the AWA but has not repealed the agency's rule does not demonstrate that Congress in any way endorses the agency's definition. There is no evidence, and USDA has provided none, that Congress even considered the "retail pet store" definition when amending the AWA. *See Veneman*, 2001 U.S. Dist. LEXIS 23439 (D.D.C. 2001), Pet. App. at 14a-15a. The court of appeals is attempting to resurrect a line of cases on this subject, including *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982), that this Court has criticized. *See Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (criticizing *Curran*). This Court clarified that when Congress makes isolated amendments to a statute, "[I]t is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." Id. citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n.1 (1989). This Court has clearly stated the rule for interpreting Congressional inaction yet the court of appeals' opinion attempts to knowingly blur this Court's holding. The Supreme Court should not allow the court of appeals to change this Court's precedent.

II. THE EFFECT OF THE COURT OF APPEALS' DECISION IS NOT CONSISTENT WITH THE PURPOSE OF THE ANIMAL WELFARE ACT

In an attempt to rationalize their failure to ensure that animals intended to be used as pets are provided humane care and treatment, 7 U.S.C. § 2131(b)(1) (2000), USDA claimed that others were performing at least some policing of puppy mills. They pointed to the work of breed groups, humane

societies, and the action of a small number of states. Unfortunately, the court deferred to this specious rationale. *See Veneman*, 315 F.3d at 301. Congress did not give USDA the authority to ignore its statutory responsibilities because a few states and humane societies are stepping forward to rescue dogs from puppy mills.[3] Nor has the USDA made any showing whatsoever that the policing of puppy mills by these organizations, individuals and some states is comprehensive, consistent or effective. By ignoring the purpose of the AWA, the court of appeals' decision allows puppy mills and other residential retailers to profit from raising animals in deplorable conditions. In addition, this exemption is much broader than Congress intended and as a result, may have the unintended effect of subjecting individuals who sell items from the home to invasion of privacy and regulatory hardship.

A. The Court Of Appeals' Decision Eliminates Animal Welfare Protection For All Animals Sold Retail

The Supreme Court has never reviewed an AWA case. Because the court of appeals has severely gutted the protections of the AWA, this case is a prime candidate for review. In a single decision, animal welfare protection is being eliminated for *all* pets sold retail. This arbitrary amputation of the AWA's scope of protection is in direct conflict with the purpose of the statute.

The legislative intent of the 1970 amendment to the AWA was to expand "the perimeters of its protection to more animals and to more people who handle, exhibit, buy or sell,

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[3] *See* Baker Decl., Pet. App. at 102a (explaining that from his experience as a puppy mill investigator, "self-regulation does not guarantee a humane ethic or replace the goals of the Animal Welfare Act, even when the dealer is affiliated with a dog organization. In particular with the American Kennel Club, their main function is not to report inhumane conditions, but rather to guarantee the parentage of the animal. A big source of their income involves the registering of dogs.").

or transport them or who use them in the pursuit of medical and scientific knowledge." H.R. Rep. No. 91-1651, *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104. Rather than providing AWA protection for more animals, the court of appeals' decision severely restricts and frustrates the broad protection Congress provided for animals intended to be used as pets. *See Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)(explaining that courts must reject administrative constructions of a statute that are "inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."). Under the ruling, the exemption of all retail dealers from AWA humane care and treatment requirements has caused, and continues to cause, terrible suffering for untold thousands of puppies and other pet animals.

B. The Court of Appeals' Decision Creates Two Different Classes Of Breeders

USDA's arbitrary expansion of the definition of "retail pet store" to include all retail dealers including those selling dogs from their private homes results in significant economic harm to wholesale breeders. By arbitrarily exempting all retail breeders from AWA compliance, the USDA has improperly created two classes of breeders, the regulated class (wholesalers) and the unregulated class (residential retailers). This results in unlawful discrimination against wholesalers. Wholesalers are subject to all of the time and cost burdens concomitant with comporting their operations to AWA licensing and humane care and treatment requirements, while residential retailers completely escape all AWA regulations and the associated costs. This discrimination against wholesalers is completely unfounded and contrary to any reasonable policy goal in enforcing the AWA. Both the regulated class (wholesalers) and the unregulated class

(residential retailers) sell large volumes of dogs.[4] *See* Wilkes-Myers Decl., Pet. App. at 85-87a (explaining that an unregulated dealer had 253 dogs); Curry Decl., Pet. App. at 90a (stating that an unregulated dealer had 400 dogs); Holland Decl., Pet. App. at 99a (describing one dealer has having 130 animals). Therefore, in terms of fulfilling the AWA's mandate for humane treatment of animals, there is no basis for this discrimination against the wholesale dealers. The only difference between the regulated class and the unregulated class is that the regulated class sells animals to pet stores while the unregulated class sells directly to consumers. This distinction is not relevant to the treatment of the animals and nowhere in the AWA is there language which sanctions this discrimination against wholesalers.

As noted *supra*, the only exemption in the AWA is for "retail pet stores." There is logic to Congress specifically exempting these stores. "Retail pet stores" are generally not in the business of breeding animals. Instead, these stores receive animals from wholesale breeders, the regulated class, and thus, there is assurance that these animals have been bred and reared in compliance with AWA licensing and humane treatment requirements prior to reaching the pet store. In addition, "retail pet stores" are open to the public which can scrutinize the animal's living conditions. Thus, the welfare of the animals in pet stores is guaranteed by wholesale suppliers being regulated and the fact that commercial establishments are subject to public scrutiny.

The logic behind the exemption for "retail pet stores" does not apply to residential retailers. Unlike "retail pet stores," this unregulated class does not receive dogs from regulated dealers, but rather breeds dogs to sell just as the regulated wholesale breeders do. Yet, because of the USDA's extend-

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[4] If USDA limited its retail pet store definition to require residential retailers to be licensed, small show and hobby breeders would be exempt from regulation. *See* 9 C.F.R. § 2.1(3)(iii)(2003).

ing the "retail pet store" exemption to these residential retailers, the retail breeders completely escape regulation. Additionally, unlike commercial pet stores, the unregulated residential retailers are not open to public scrutiny. These dealers raise animals stacked in cages in their backyards, basements, or barns out of public view. The animals are then sold through the newspaper or the internet. The public never has a chance to view the living conditions of the animals. *See* Baker Decl., Pet. App. at 102a (stating that "it is completely erroneous to suggest that individual retail dealers are not part of the puppy mill problem. Furthermore, investigating unlicensed retail dealers who breed and sell animals from their own property can be difficult because these dealers are not open to the public and therefore are not easily accessible."). Thus, while the AWA exemption for "retail pet stores" is based in sound policy, the USDA's illegal extension of this exemption to residential retailers is legally incoherent in that the welfare of these retailer's animals is neither controlled by any regulated breeder or scrutinized by public oversight.

Wholesale dealers are economically harmed in yet another way by USDA's arbitrary exemption of residential retailers from the AWA. Not only does the unregulated class profit from avoiding the cost of AWA compliance, but also this very often results in residential retailers raising animals in deplorable conditions. The news media has widely publicized the terrible conditions at these puppy mills. Fortunately, these stories have brought attention to the puppy mill problem. Unfortunately, because the public makes little distinction between wholesalers and retailers, the regulated wholesalers are being tarred with the same media brush as the unregulated residential retail dealers. As a result, the entire breeding industry then suffers from extremely poor public perception. If, as was intended by the AWA, the unregulated class followed the same humane care and treatment standards as the regulated class, then much of the puppy mill problem

would be eliminated, and the industry would avoid the public relations problems and resulting economic harm brought about by continuing exposes of puppy mills.

In sum, USDA's *ultra vires* action in creating different classes of breeders/dealers should not be allowed to stand. The unlawful distinction between the regulated class (wholesalers) and the unregulated class (residential retailers) is meaningless and fundamentally frustrates the purposes of the AWA by economically discriminating against wholesale breeders, besmirching the public perception of the entire industry and excluding large numbers of animals from AWA protections.

C. The Court Of Appeals' Decision May Cause People Who Sell Retail From Their Homes To Be Subject To Invasions Of Privacy And New Regulations

The court of appeals' decision specifically equates "homes" and "residences" with "retail stores," finding no meaningful legal definitional distinction between these terms. *See Veneman*, 315 F.3d 297. Not only does this finding defy the AWA and the commonly understood usage of these terms, it also could subject untold numbers of individuals who sell items from their home to invasion of privacy and numerous regulations that cover commercial "retail store" establishments such as, zoning, licensing, and sanitation standards.[5] For example, under USDA and the court of appeals' logic, a hobby craftsman who occasionally sells crafts from the home may be surprised to discover that his home is labeled as a "retail store." Clearly, equating the legal status of private homes with commercial businesses could create significant hardship for many homeowners and unprecedented confusion in a number of commercial and privacy law areas.

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[5] As stated supra, the court of appeals recognizes that a store may be subject to the local zoning authority. *Veneman*, 315 F.3d at 298.

USDA's brief attempts to blunt this significant legal problem created by the court of appeals' opinion in two ways. First, USDA states that the court did not hold that private residents "*must* be equated with commercial establishments" for all purposes (emphasis added). Resp't Br. at 7. Next, USDA notes that petitioners have not presented any examples of the how the opinion has resulted in regulation of such private residences. *Id.* As for the USDA's first argument, petitioners do not claim that the court's opinion holds that all private residences "must" be equated with commercial businesses, but rather that the court finds that there is no useful legal distinction between these terms. It should be noted that the court does not limit this equating of homes with retail stores solely to the AWA, but rather finds its purported support in "possible" dictionary meanings of the terms. *Veneman*, 315 F.3d at 289-299. Therefore, the court's finding could well create important and unfortunate precedent that could be used by regulators at the local, state, or federal levels to regulate private residences as commercial businesses. While it is true that no such cases have yet occurred, this is hardly comforting in that it has only been a few months since the opinion was issued. The USDA has completely failed to refute petitioners' argument that the court's opinion creates legal confusion and potential hardship for an incalculable number of individuals selling items retail from their private homes. Therefore, the Supreme Court should grant review of this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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August 25, 2003